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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. TARELL JOHNSON, Defendant and Appellant.	B284690 (Los Angeles County Super. Ct. No. KA112511)

APPEAL from a judgment of the Superior Court of Los Angeles County, Juan Carlos Dominguez, Judge. Affirmed in part and reversed in part with directions.

Leonard J. Klaif, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael C. Keller, and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Tarell Johnson appeals the trial court's judgment sentencing him to 24 years 8 months for burglarizing the home of Stephen Yeh (count 1, in violation of Penal Code[1] section 459), possession of burglar tools on the day of the Yeh burglary (count 2, in violation of section 466), and possession of Yeh's personal information with intent to defraud (count 3, in violation of section 530.5, subd. (c)(1)). Johnson argues that the evidence is insufficient to support his convictions on counts 2 and 3. Because substantial evidence does not support the possession element of either offense, we agree. We therefore need not address Johnson's section 654 argument that the trial court should have stayed his sentences for these counts.

Johnson next argues that the evidence is insufficient to support the gang enhancements reflected in his sentence. We disagree. Substantial evidence supports the jury's findings that Johnson: (1) committed the underlying offense of burglary in association with fellow Grape Street Crips gang members, and (2) specifically intended to assist them in this criminal activity. Together, these findings satisfy the requirements for a gang enhancement under section 186.22, subdivision (b)(1).

We therefore reverse the judgment as to the convictions on count 2 (possession of burglary tools) and count 3 (possession of identifying information). We affirm the jury's true findings regarding the gang enhancement under section 186.22, subdivision (b)(1), and remand to the trial court for resentencing on count 1 (burglary).

Finally, Johnson requests remand in light of Senate Bill No. 1393, which became effective January 1, 2019 and renders

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[1] Unless otherwise specified, all subsequent statutory references are to the Penal Code.

discretionary the previously mandatory five-year sentence enhancement under section 667, subdivision (a)(1). We agree that the amendment should apply to Johnson's sentencing. Thus, in resentencing Johnson, the trial court may consider whether to exercise its discretion to strike the section 667, subdivision (a)(1) five-year sentencing enhancement.

FACTUAL AND PROCEDURAL SUMMARY

Viewing the evidence presented at trial in the light most favorable to the judgment, as we must (*People v. Johnson* (1980) 26 Cal.3d 557, 578), the key facts regarding the underlying offenses and gang enhancements are as follows.

A. *Burglary of the Yeh Home*

On May 9, 2016, Johnson was at the Hacienda Heights residence of Stephen Yeh from approximately 11:30 a.m. and 12:11 p.m. Johnson did not know Yeh and did not have permission to enter Yeh's home. At approximately 12:30 p.m. that day, Los Angeles County Sheriff's deputies patrolling Hacienda Heights observed a vehicle with its license plate covered by a paper plate. The deputies observed the vehicle suddenly pull to the side of the road. They approached the vehicle and found Johnson and his former codefendants, Carlos Mendoza and Marcus Gilmore, inside.[2] Mendoza was in the driver's seat; Johnson was in the back seat directly behind Mendoza. Mendoza owned the vehicle.

A pillowcase was found on the floor behind the driver's seat, containing approximately $200 in coins. The pocket on the back of the driver's seat contained five pairs of construction-type gloves. In the trunk were two more pairs of such gloves, as well as several tools commonly used by burglars: a rubber mallet, a screwdriver,

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[2] Gilmore and Mendoza's cases were resolved before trial.

a tire iron, and several pry bars. The trunk also contained approximately $200 in cash, foreign currency, and a number of personal belongings, including a purse. The purse contained two California identification cards bearing the name Stephen Yeh, and a Chinese figurine. Deputies also found some Asian currency and $143 stuffed in Johnson's sock.

Later that afternoon, the deputies dispatched to Yeh's residence found the bedroom window had been "smashed" and the home had been ransacked. Yeh later confirmed items were missing from his home, and identified many of the items retrieved from Mendoza's vehicle as among his missing property.

B. *Prosecution's Gang Evidence at Trial*

The prosecution charged Johnson with residential burglary (section 459), possession of burglary tools (section 466), and identifying information theft (section 530.5, subd. (c)(1)), and sought gang-related sentencing enhancements (section 186.22, subd. (b)(1)(B) [burglary]) and (section 186.22, subd. (d) [remaining charges]).

To support the gang enhancements, the prosecution offered the testimony of Los Angeles Police Officer Adam Renteria, an expert on gangs generally and the Grape Street Crips gang specifically. Officer Renteria offered his opinion that Johnson and Gilmore were members of the Grape Street Crips gang, and that Mendoza was an associate of that gang.[3] He opined that a

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[3] Renteria testified that an associate of a gang is someone who is not a full member, but rather spends time with the gang, drives gang members around, or accompanies them on different occasions. In his appeal, Johnson raises no arguments relying on Mendoza's role as an associate, rather than a member, of the Grape Street Crips.

hypothetical factual scenario mirroring the facts in this case reflected an act committed "in association with" a gang, because all participants in the crime were gang members. He further opined that this same hypothetical scenario reflected an act committed "for the benefit of" a gang. He based this second opinion on his general knowledge that proceeds from a burglary committed by gang members "could" be used to purchase firearms or narcotics for the gang, or to flaunt wealth as a means of recruiting new members.

C. *Defense Evidence at Trial*

In his defense at trial, Johnson offered only one witness, Malachi Curry, an acquaintance of Johnson who testified about how Johnson came to be at the Yeh residence and how Yeh's property came to be in Mendoza's car. Curry testified as follows: Curry acted alone in breaking into Yeh's home on the morning of May 6, 2016. While there, Curry gathered several items he intended to steal. He then received a call from Gilmore, who wanted to purchase marijuana from Curry. Curry gave Gilmore the Yeh address, but identified the property as Curry's girlfriend's home. Johnson and Gilmore arrived at the Yeh residence, where they waited for Curry's marijuana "connect," who never came. At some point, Curry sold Gilmore some of the belts he had taken from Yeh's home. Johnson, Gilmore, and Mendoza ultimately gave Curry a ride to Curry's car around the corner. Curry, however, forgot to retrieve the items he had stolen and loaded into the car Mendoza was driving. When Curry called Johnson about retrieving the items, Johnson agreed to come back, but never did so.

At trial, the parties stipulated that Curry and Johnson were housed in the same jail dorm from August 9 to August 27, 2016. Curry also admitted to being under the influence of marijuana and Xanax® during the events he described, and to not remembering several details as a result. At the time he testified, Curry was

incarcerated and awaiting trial for another burglary. He testified that he understood his testimony could lead to additional jail time.

D. *Johnson's Convictions and Sentencing*

The jury convicted Johnson on all three counts and found true the gang-enhancement allegations. Johnson admitted to having suffered two convictions under the "Three Strikes" law (section 667, subds. (b)-(i), section 1170.12, subd. (a)-(d)), though the court struck one of his prior convictions before sentencing.

The court sentenced Johnson to a prison term of 24 years 8 months. This reflected a 12-year term for the burglary charge, five additional years for the gang enhancement on the burglary charge, two consecutive terms of 1 year 4 months each for counts 2 and 3 (possession of burglary tools and identifying information), which the gang enhancement findings increased from misdemeanors to felonies, and a five-year mandatory sentencing enhancement under section 667, subdivision (a)(1), based on one of Johnson's prior convictions.

DISCUSSION

I. Sufficiency of Evidence Supporting Possession Convictions

At this court's request, the parties filed letter briefs regarding the sufficiency of the evidence to support Johnson's possession of burglary tools and possession of identifying information convictions, which Johnson did not challenge in his initial briefing. In reviewing the sufficiency of evidence to support a conviction, we consider whether the entire record contains substantial evidence—meaning "evidence that is reasonable, credible, and of solid value" (*People v. Ramon* (2009) 175 Cal.App.4th 843, 850)—"from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People*

v. Wilson (2008) 44 Cal.4th 758, 806.) In so doing, "[w]e presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence[, and] reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding." (*People v. Albillar* (2010) 51 Cal.4th 47, 60 (*Albillar*).)

We conclude that substantial evidence does not support Johnson's convictions on counts 2 and 3.

A. *Possession of Burglary Tools Conviction (Count 2)*

A conviction for violating section 466 requires proof that (1) the tools at issue fall within the scope of the statute,[4] and that (2) the defendant possessed those tools, (3) "with intent feloniously to break or enter into any building." (§ 466.)

Johnson does not dispute that the mallet, screwdriver, pry tool, and tire iron found in the vehicle are burglary tools under section 466. The prosecution did not argue that the gloves found in the vehicle constituted burglary tools, nor could it. (See *People v. Diaz*, *supra*, 207 Cal.App.4th at p. 404 ["We have no authority to add gloves and bags to the statute by judicial decree"; "section 466 is limited to instruments and tools used to break into or gain access

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[4] Section 466 identifies the following "instruments or tools": "picklock, crow, keybit, crowbar, screwdriver, vise grip pliers, water-pump pliers, slidehammer, slim jim, tension bar, lock pick gun, tubular lock pick, bump key, floor-safe door puller, master key, ceramic or porcelain spark plug chips or pieces, or other instrument or tool." Courts have interpreted "other instrument or tool" to refer to a " 'device itself . . . *similar* to those specifically mentioned,' " rather than one which " 'can accomplish the same general purpose as' " the tools enumerated in the statute. (See *People v. Diaz* (2012) 207 Cal.App.4th 396, 401, citations omitted.)

to property in a manner similar to using items enumerated in section 466."].)

As to the second element, Johnson did not have actual possession of these tools, because they were in the trunk of Mendoza's car. Johnson may have constructively possessed the tools, however, if circumstantial evidence supported that Johnson "knowingly" exercised "control or dominion" over them. (*People v. Land* (1994) 30 Cal.App.4th 220, 224 [stolen property]; see CALJIC No. 1.24 [possession generally]; see also *People v. Williams* (1971) 5 Cal.3d 211, 215 [possession may be proven by circumstantial evidence].) "Two or more persons together may share actual or constructive possession." (CALJIC No. 1.24.)

Here, no evidence suggests that Johnson could access the tools contained in the trunk of the car while seated in the backseat, let alone that he exercised "control or dominion" over them. The record does not indicate whether the trunk was accessible from the back seat, whether the trunk was locked, and/or whether Johnson successfully could have demanded Mendoza stop the car and unlock or open the trunk. A finding that Johnson had access to the tools thus would be based on pure speculation. (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633 ["inferences that are the result of mere speculation or conjecture cannot support a finding"]; *People v. Perez* (1992) 2 Cal.4th 1117, 1133 [" 'In any given case, one "may *speculate* about any number of scenarios that may have occurred [. . . .] A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence." ' "].)

Moreover, "mere presence or access" alone is insufficient to establish dominion and control. (*People v. Zyduck* (1969) 270 Cal.App.2d 334, 336.) "Something more must be shown to support [an] infer[ence]" that Johnson had "[d]ominion and control" over tools in the trunk of a moving car Johnson occupied, but did not own and was not driving. (*Ibid*.) That "[s]omething more" is lacking here as well. The prosecution argued at trial that the tools theoretically *could* have been used to smash the window of the Yeh residence during the Yeh burglary. But establishing Johnson's access to or control over the tools in the trunk on this basis piles inference upon inference, resulting in an ultimate inference "so remote from the evidence that it should be rejected." (*Walton v. Anderson* (1970) 6 Cal.App.3d 1003, 1009; *Savarese v. State Farm Etc. Ins. Co.* (1957) 150 Cal.App.2d 518, 520 ["Of course, the building of inference upon inference may often result in a progressive weakening of logical sequence, and lead to an ultimate conclusion which is untenable on the basis of the facts proven."].) Because nothing in the record suggests a connection between Johnson and the tools in the trunk, substantial evidence does not support that he possessed them under any theory. (See, e.g., *People v. Myles* (1975) 50 Cal.App.3d 423, 429 [concluding no substantial evidence to support possession of stolen property in trunk of a car in which appellant "was merely a passenger" and that he did not own, where appellant was "but one of several persons . . . who were seen looking into the trunk"].)

Thus, substantial evidence does not support the jury's conviction for possession of burglar tools (count 2).

B. *Substantial Evidence Does Not Support the Possession of Identifying Information Conviction (Count 3)*

To support a conviction under section 530.5, subdivision (c)(1), the jury must find (1) the information at issue constitutes "personal identifying information . . . of another person" as defined in section 530.55, (2) the defendant "acquir[ed] or retain[ed] possession" of such information, and (3) the intent to defraud. (§ 530.55, subd. (c)(1).)

Johnson does not dispute that identification cards reflect several types of personal identifying information enumerated in section 530.55. (§ 530.55, subd. (b).)

As to the possession element, there is evidence that, when considered together, suggests that Johnson knew the trunk of the car contained stolen property from Yeh's home: Johnson was present at Yeh's home during the burglary, property in the trunk was from the Yeh home, and Johnson had other such property hidden in his sock. (See *People v. Estrada* (1965) 234 Cal.App.2d 136, 156 ["[T]he inference of possession of . . . heroin and defendant's knowledge of its presence" was "warranted" where defendant "had needle marks on his arms," "was connected with narcotics," and attempted to hide this connection.].) But the identification cards were contained in a purse in the trunk and are small enough that their presence may not have been immediately apparent, unless one looks *in* the purse. Thus, even if we accept that substantial evidence supports that Johnson knew the trunk contained Yeh's property, the jury could not reasonably infer from such evidence that Johnson knew identification cards were among the property. Because substantial evidence does not support that Johnson "knowingly" exercised dominion or control over the identification cards, the evidence was insufficient to support the

conviction for possession of identifying information. (See CALJIC No. 1.24.)

II. Section 654 Issues

Johnson argues that because his convictions spring from a single course of conduct—the burglary of the Yeh residence—section 654 prohibited the trial court from imposing a sentence for more than one of those convictions. Because we conclude substantial evidence does not support either of the non-burglary convictions, the sentences for which Johnson seeks to have stayed, Johnson's section 654 argument is moot.

III. Gang Enhancement Issues

We review the sufficiency of the evidence to support an enhancement using the same substantial evidence standard we apply to a conviction. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1382.)

Johnson contends the evidence was insufficient to sustain the jury's true finding regarding the gang enhancements under section 186.22, subdivision (b)(1). Under this subsection,[5] the

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[5] Specifically, the relevant portion of this subsection provides:

> "(b)(1) . . . any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony . . . be punished as follows: [¶] . . . [¶] (B) If the felony is a serious felony, as defined in subdivision (c) of [s]ection 1192.7, the person shall be punished by an additional term of five years."

Pursuant to identical language in section 186.22, subdivision (d), the court enhanced Johnson's sentences on counts 2 and 3 as well.

prosecution must establish two "prongs:" (1) that the underlying crime was " 'committed for the benefit of, at the direction of, or in association with any criminal street gang' " *and* (2) that "the crime[] [was] committed 'with the specific intent to promote, further, or assist in any criminal conduct by gang members.' " (*People v. Rios* (2013) 222 Cal.App.4th 542, 561; see § 186.22, subds. (b)(1) & (d).) Johnson argues that the evidence is insufficient to support either prong. We disagree.

A. *Prong One: Substantial Evidence Supports That the Crimes Were Committed "in Association with" a Gang*

As to the first prong of section 186.22, subdivision (b)(1), the prosecution offered Officer Renteria's expert opinion to support its theory that Johnson committed the underlying offenses both "in association with" and "for the benefit of" the Grape Street Crips.

A jury may "reasonably infer the requisite association" element of prong one "from the very fact that defendant committed the charged crime[] in association with fellow gang members," absent evidence that the gang members' actions were "unrelated to the gang." *(People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 *(Morales*); see *Albillar*, *supra,* 51 Cal.4th at p. 62 [rejecting defendant's arguments that defendants were acting as family members, where no evidence suggested family ties, rather than gang membership, motivated sexual assault of victim].) If, however, such "unrelated" evidence is presented, the jury must weigh all the evidence to determine whether the participants in fact "came together *as gang members*" to commit the crime. (*Ibid.*)

Johnson challenges those enhancements on appeal. That challenge is moot, however, as we conclude substantial evidence does not support the convictions on counts 2 and 3.

Curry's testimony is the only evidence in the record that relates to this issue. Curry's version of events suggests that, rather than acting as gang members seeking out the opportunity to burgle, these men happened upon that opportunity while acting as friends in search of marijuana to smoke together. Johnson implies that Curry's testimony may support his challenge to the gang enhancements in this way.

Of course, the jury was not required to accept his testimony, nor are we free to "reweigh[] evidence [or] reevaluate[] a witness's credibility." (*People v. Lindberg* (2008) 45 Cal.4th 1, 27-28; *Albillar*, *supra,* 51 Cal.4th at p. 60.) But the prosecution argued at trial—and the jury reasonably may have agreed—that Curry's testimony was not credible. Substantial evidence therefore supports that Johnson committed the burglary of the Yeh home "in association with" a gang. And, because prong one of section 186.22, subdivision (b)(1) requires that the crime be *either* "for the benefit of" *or* "in association with" a gang, prong one is satisfied here. We therefore need not consider whether Johnson committed the burglary "for the benefit of" a gang as well.[6] *(Albillar*, *supra*, 51 Cal.4th at p. 63.)

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[6] Contrary to the applicable statutory language, the jury's verdict form refers to all three of the possible bases for supporting prong one of section 186.22, subdivision (b)(1)—"in association with," "for the benefit of," and "at the direction of"—in the *conjunctive*. Specifically, the form regarding the enhancement of the burglary count provides: "We further find the allegation pursuant to Penal Code section 186.22[, subdivision](b)(1)(B) that the above offense was committed for the benefit of, at the direction of and in association with a criminal street ga[ng] with the specific intent to promote, further and assist in criminal conduct by gang members to be [true]." Nevertheless, the statutory language of section 186.22 summarized in the verdict form plainly is

B. *Prong Two: Specific Intent*

The second prong of section 186.22, subdivision (b)(1), requires that a defendant commit the gang-related felony "with the specific intent to promote, further, or assist other criminal conduct by gang members." The California Supreme Court has confirmed that the intent to assist in the underlying offense can satisfy this second prong. (*Albillar*, *supra*, 51 Cal.4th at pp. 64–65.) Johnson does not challenge his burglary conviction, which constitutes criminal conduct by both Johnson and other Grape Street Crip gang members and a Crips associate. Substantial evidence supports that Johnson specifically intended to assist his fellow gang members in committing the burglary. On this basis, the second prong of section 186.22, subdivision (b)(1) is satisfied.

IV. Senate Bill No. 1393

In a supplemental letter brief, Johnson requests remand for resentencing in light of Senate Bill No. 1393, which amends section 667, subdivision (a)(1). Under the version of that law in effect at the time of Johnson's sentencing, the court was required to and did impose a five-year enhancement, based on one of Johnson's prior convictions. After Senate Bill No. 1393 became effective on January 1, 2019, however, trial courts have discretion to strike this enhancement in the interests of justice, pursuant to section 1385. Johnson argues—and the Attorney General acknowledges—that this change in law should be retroactively applied to all cases

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disjunctive, as the California Supreme Court has confirmed. (See *Albillar*, *supra*, 51 Cal.4th at p. 63.) And in any event, the prosecution presented no evidence that a gang directed anyone to perform the underlying offenses.

pending on the date it goes into effect. Because we see nothing in the language or history of Senate Bill No. 1393 suggesting the legislature intended otherwise, we agree. (See *In re Estrada* (1965) 63 Cal.2d 740, 742 [mandating retroactive application of sentence-ameliorating statute to all judgments not yet final on the date of enactment, absent evidence of contrary legislative intent]; *People v. Francis* (1969) 71 Cal.2d 66, 76 [applying *In re Estrada* to amended statute that increased court's discretion to impose lesser sentence].)

Thus, in resentencing Johnson as a result of our reversing Johnson's convictions on counts 2 and 3, the trial court can and should consider whether to exercise the additional discretion granted it under Senate Bill No. 1393. Of course, in reaching this conclusion, we express no opinion regarding how the trial court should exercise this discretion and/or whether it should strike the five-year sentence enhancement under section 667, subdivision (a)(1).

DISPOSITION

The judgment is reversed with respect to the convictions and sentences for count 2 (section 466 [possession of burglary tools]) and count 3 (section 530.5, subd. (c)(1) [possession of personal information with intent to defraud]). We affirm the jury's true findings with respect to the section 186.22, subdivision (b)(1) gang enhancement on the remaining count 1 (section 459 [burglary]), and remand with instructions that the trial court sentence Johnson on count 1, enhanced as the trial court deems appropriate in light of the jury's true findings and any other applicable factors under the law as it exists at the time of such resentencing.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

CURREY, J.*

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* Associate Justice of the Court of Appeal, Second Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.